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No. 96-1181

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Petitioner,
v.
CITY OF PHILADELPHIA, and
CONSOLIDATED RAIL CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF OF AMICUS CURIAE NATIONAL RAILROAD PASSENGER CORPORATION IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether Amtrak's exemption from any "tax or fee imposed by a state" in 49 U.S.C. § 24301(*l*) prevents the Pennsylvania Public Utility Commission from assessing Amtrak for maintenance of public highway bridges.

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BRIEF OF AMICUS CURIAE NATIONAL RAILROAD PASSENGER CORPORATION IN SUPPORT OF RESPONDENTS

Pursuant to Rule 37 of the Rules of the Supreme Court of the United States, all parties have consented in writing to the filing of this brief by Amicus National Railroad Passenger Corporation ("Amtrak") and their consents have been filed with the Court contemporaneously with the filing of this brief.

INTEREST OF AMICUS CURIAE

Amtrak is a federally subsidized corporation that was established by Congress to operate passenger train service throughout the United States. Under 49 U.S.C. § 24301(*l*), Amtrak is exempt from all state and local taxes or fees. Although Amtrak was not a party to the proceedings before the Commonwealth Court of Pennsylvania whose order is at issue in this petition,[1] the brunt of the order falls squarely on Amtrak. The Commonwealth Court remanded issues regarding the 41st Street Bridge in Philadelphia to the Pennsylvania Public Utility Commission (PUC) and directed the PUC to impose highway bridge maintenance responsibilities upon Amtrak. The court found that Amtrak's exemption from state and local taxes or fees pursuant to 49 U.S.C. § 24301(*l*) does not extend to special assessments for Pennsylvania highway bridge construction and maintenance.

SUMMARY OF ARGUMENT

The Commonwealth Court's remand order is in direct conflict with other decisions of that same court and

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[1] Petitioner erroneously requested a writ of certiorari directed to the Supreme Court of Pennsylvania. The petition should have requested a writ directed to the highest court that ruled on the merits below, which in this case is the Commonwealth Court of Pennsylvania. See, e.g., *Faretta v. California*, 422 U.S. 806, 812 (1975).

with all federal courts that have addressed this issue. This Court should not address this anomalous decision by an intermediate state court for several reasons. First, the petition does not present a ripe case or controversy and the position of the petitioner is completely aligned with the position of the respondents. Second, the decisions of all the federal courts on this issue are unanimous and the Pennsylvania Commonwealth Court decision represents a misapplication of a properly stated rule of law. Finally, Amtrak has initiated federal court proceedings to address these issues as contemplated by 49 U.S.C. § 24301(*l*)(2). Amtrak therefore respectfully requests that the petition be denied.

STATEMENT OF THE CASE

A. Background

1. *Amtrak Is Exempt From State and Local Taxes and Fees.*

Amtrak was established in 1971 as a "for-profit" corporation to provide intercity passenger train service throughout the United States. 45 U.S.C. § 541. In an effort to reduce Amtrak's reliance on federal subsidies, in 1979, Congress directed the Secretary of Transportation to study ways to reduce federal outlays to Amtrak, including a possible reduction in Amtrak's state and local tax liability. In his 1980 report to Congress, the Secretary estimated that these taxes would cost Amtrak more than $14 million in the upcoming year alone. S. Rep. No. 253, 97th Cong., 1st Sess. 103 (1981).

The Secretary concluded, and Congress agreed, that "state and local taxes on a primarily Federal investment are inappropriate." *Id.* As a result, Congress passed temporary legislation to exempt Amtrak from all state or local taxes for a one-year period. *Department of Transportation And Related Agencies Appropriation Act,* 1982 Pub. L. No. 97-102, 1981 U.S.C.C.A.N. (95 Stat.) 1442, 1451. The Senate Appropriation Committee Report explained the reasoning for the exemption as follows:

> [S]uch taxation serves to erode the revenue-to-cost ratios which impact on whether States and localities continue to receive the benefit of Amtrak services. The Committee believes it is unreasonable for Federal funds to be granted to Amtrak to provide a tax windfall to States and localities, and consequently the bill prohibits Amtrak from using any appropriated funds or assets for the payment of any State and local taxes.

S. Rep. No. 253, 97th Cong., 1st Sess. 103 (1981).

On September 10, 1982, pursuant to Public Law 97-257, 96 Stat. 852, Congress made permanent Amtrak's exemption from state and local taxes and fees, which provided in relevant part:

> Notwithstanding any other provision of law, the National Railroad Passenger Corporation . . . shall be exempt from any taxes or other fees imposed by any State, political subdivision of a State, or local taxing authority which are levied on [Amtrak] . . . from and after October 1, 1981 . . . .

45 U.S.C. § 546b.[2]

In the legislative history of this second enactment, Congress reiterated its judgment that the states which benefit from Amtrak services should be required to contribute to the continuation of Amtrak's operations through tax relief. As the Senate Appropriations Committee noted:

> This action was taken in recognition of the fact that there are many parts of the country which would gladly pay an amount equal to local or State taxes

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[2] As part of an overall recodification of the United States Code, Section 546b was repealed by Pub. L. 103-272, 108 Stat. 1379, 1393 and reenacted with linguistic, but not substantive changes. See H.R. Rep. No. 180, 103 Cong., 1st Sess. 1, 3, 5 (1993). It was recodified at 49 U.S.C. § 24301(*l*), which provides that "Amtrak or a rail carrier subsidiary of Amtrak is exempt from tax or fee imposed by a State, a political subdivision of a State, or a local taxing authority and levied on it after September 30, 1981." Hereafter, all references to Amtrak's exemption will be to § 24301(*l*).

> owed by Amtrak in order to have the benefit of Amtrak's service. It remains the Committee's judgment that those who receive this service have some obligation to contribute toward its continuation. At a time when local jurisdictions are demanding that nationwide rail passenger service be maintained, it seems reasonable to provide for a "user contribution" whereby those areas receiving the service in turn contribute to Amtrak's continued existence through tax relief.

S. Rep. No. 516, 97th Cong., 2d Sess. 170 (1982).

The legislative history of the tax exemption makes clear that Congress intended immunity from state and local taxation to be as broad as the federal government's immunity from such taxes. See H.R. Rep. No. 81, 97th Cong., 1st Sess. 21 (1981) (The Committee bill "exempts Amtrak from the payment of all state and local taxes, . . . *to the same extent the United States is exempt* from the payment of such taxes and other fees.") (emphasis added). Thus, like the United States, Amtrak is exempt from all state and local taxes and other fees, and Amtrak's exempt status is as broad as that of the United States. See *National Railroad Passenger Corp. v. Pennsylvania Public Utility Comm'n*, 665 F. Supp. 402 (E.D. Pa. 1987), aff'd, 848 F.2d 436, 440 (3d Cir.), cert. denied, 488 U.S. 893 (1988) (*Amtrak I*).

2. *Amtrak's Federal Exemption Has Been Upheld by the Federal Courts.*

Congress also provided a specific means for Amtrak to enforce its rights under the federal exemption. In the event a state or locality attempts to impose a tax or fee on Amtrak in violation of Section 24301(*l*)(1), Amtrak can look to the federal district courts for protection of this federally-created exemption. Pursuant to 49 U.S.C. § 24301(*l*)(2), "the district courts of the United States have original jurisdiction over a civil action Amtrak brings to enforce this subsection and may grant equitable

or declaratory relief requested by Amtrak."[3] See, e.g., *Department of Revenue and Taxation for the State of Wyoming v. National Railroad Passenger Corp.*, 1982 WL 1584 (D. Wyo. Dec. 15, 1982) (holding that Amtrak's tax exemption is a valid exercise of Congress' power and prohibiting state from recovering taxes from Amtrak); *National Railroad Passenger Corp. v. New Castle County*, 633 F. Supp. 354 (D. Del. 1986) (upholding constitutionality of Amtrak's exception and ordering county and other local entities to refund taxes paid by Amtrak after effective date).

Amtrak sought such protection from a tax imposed by this very petitioner over ten years ago, when the PUC directed Amtrak to pay a portion of the costs to replace a highway bridge carrying a city street over tracks owned by Amtrak. Amtrak challenged the PUC's order as inconsistent with Amtrak's federal exemption and brought an action for declaratory and injunctive relief in the federal district court. *Amtrak I*, 665 F. Supp. 402 (E.D. Pa. 1987). The district court carefully reviewed the Congressional intent underlying passage of Amtrak's exemption and held that the exemption precluded an assessment by the PUC for the construction or maintenance of the highway bridge. *Id.* at 411.

> The extensive federal involvement [in] Amtrak's management, finances and operations make it apparent that the legislative exemptions should be liberally construed to effectuate its goals. Section 546b is no mere exemption of an essentially private entity in exchange for some other benefit to the federal government. Rather, it is an attempt to guarantee Amtrak's fiscal integrity, and indeed its survival. The

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[3] 45 U.S.C. § 546b, the predecessor to 49 U.S.C. 24301(*l*)(2), granted original jurisdiction to the federal courts "notwithstanding the provision of § 1341 of title 28," the anti-tax injunction act. In the recodification of this provision, this language was omitted as "surplus." H.R. Rep. No. 180, 103d Cong., 1st Sess. 123 (1993).

> federal government has pursued governmental functions and policies through Amtrak. It would be inappropriate to undermine those goals through the too stingy construction of the exemption offered by the defendants.

Id.

In addition to issuing a declaratory judgment upholding the application of Amtrak's exemption for Pennsylvania assessments for highway bridges, the district court permanently enjoined the PUC from allocating to Amtrak the costs of constructing or maintaining the particular highway bridge at issue in that case. The PUC appealed to the United States Court of Appeals for the Third Circuit. On appeal, the Third Circuit affirmed the decision of the district court, finding that "[t]he statute's text, its legislative history, and analogous caselaw persuade us to give the exemption . . . a broad interpretation that fulfills the intent of Congress." *Amtrak I*, 848 F.2d at 440. The Third Circuit held that "Amtrak's immunity from local 'taxes or other fees' . . . extends to assessments for local improvements of the kind at issue here." *Id.* When the PUC petitioned for a writ of certiorari to this Court on the same issue presented by this petition, certiorari was denied. *Pennsylvania Public Utility Comm'n v. National Railroad Passenger Corp.*, 488 U.S. 893 (1988).

Every federal court that has considered the scope of § 24301(*l*) has affirmed the Third Circuit's conclusion in *Amtrak I*. See *National Railroad Passenger Corp. v. Pennsylvania*, 1991 WL 998 (E.D. Pa. Jan. 2, 1991), reproduced here as Amicus Appendix A (*Amtrak II*); *Southeastern Pennsylvania Transportation Authority v. Pennsylvania Public Utility Commission*, 802 F. Supp. 1273 (E.D. Pa. 1992); *Southeastern Pennsylvania Transportation Authority v. Pennsylvania Public Utility Commission*, 826 F. Supp. 1506 (E.D. Pa. 1993), aff'd per curiam, 27 F.3d 558 (3d Cir.), cert. denied, 115 S.Ct. 318 (1994). For example, in 1991, the PUC ordered Am-

trak to repair and maintain the same highway bridge that the PUC had attempted to order Amtrak to replace with a new bridge in *Amtrak I*. The district court reconsidered the scope of § 24301(*l*) and enforced its permanent injunction relating to that bridge against the PUC to prevent it from again violating Amtrak's exemption from state and local taxes and fees. *Amtrak II*, 1991 WL 998 (E.D. Pa. Jan. 2, 1991).

Federal district courts in Pennsylvania reached the same conclusion when the PUC attempted to impose highway bridge assessments on the Southeastern Pennsylvania Transportation Authority (SEPTA), the local commuter rail service operator in Philadelphia. Congress had extended the same federal exemption from state and local taxes and fees to SEPTA and certain other commuter rail operators under 49 U.S.C. § 24501(g) (formerly 45 U.S.C. § 581(c)(5)).[4] See *SEPTA v. Pennsylvania Public Utility Commission*, 826 F. Supp. 1506 (E.D. Pa. 1993), aff'd per curiam, 27 F.3d 558 (3d Cir.), cert. denied, 115 S.Ct. 318 (1994). Despite this exemption, the PUC and the Commonwealth Court of Pennsylvania assessed SEPTA for the upkeep of four highway bridges passing over tracks owned and operated by SEPTA. SEPTA sought the protection of the federal district court and received a permanent injunction barring the PUC from assessing SEPTA for construction, design, maintenance, inspection or repair of the highway bridges. 826 F. Supp. at 1511. The Third Circuit *again* affirmed that such assessments constituted a "tax or fee" prohibited by

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[4] 45 U.S.C. § 581(c)(5) stated that local commuter authorities "shall be exempt from the payment of any taxes or other fees to the same extent [Amtrak] is exempt." 45 U.S.C. § 581 was repealed by Pub. L. 103-272, 37(b), 108 Stat. 1379, on July 5, 1994, and reenacted and recodified in 49 U.S.C. § 24501(g), which provides that "a commuter authority . . . is exempt, effective October 1, 1981, from paying a tax or fee to the same extent Amtrak is exempt." Congress extended the exemption because of the extensive federal investment in commuter rail operations.

§ 581(c)(5). This Court *again* denied the PUC's petition for certiorari to review whether SEPTA (and hence Amtrak) is exempt from the imposition by the PUC of responsibility for maintaining public highway birdges.[5]

Among the 45 states in which Amtrak operates, the Commonwealth of Pennsylvania stands alone in continuing to assess Amtrak for local public improvements. Other states have accepted and followed the consistent and unanimous reasoning of the Third Circuit and the district courts in holding that § 24301(*l*)(1) prohibits states and localities from assessing local improvements against Amtrak.

B. The Decisions Below

Against this backdrop of unanimous federal court interpretation regarding the scope of Amtrak's federal exemption in Section 24301(*l*),[6] the PUC instituted an investigation into the maintenance responsibility for the 41st Street Bridge in Philadelphia, a deteriorating highway crossing above tracks owned by Amtrak and Respondent Consolidated Rail Corporation (Conrail). On December 10, 1993, the PUC ordered Amtrak to incur the cost of preparing plans and repairing the highway bridge, to be reimbursed later by the City of Philadelphia. On De-

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[5] Subsequently, on January 19, 1996, the United States District Court for the Eastern District of Pennsylvania approved a Consent Decree between SEPTA and the PUC in which the PUC agreed that "[u]nder 49 U.S.C. § 24301(*l*) and 24501(*g*), the Commission is barred hereafter from assessing or continuing to assess upon SEPTA the cost or responsibility for design, construction . . . or repair of any Highway Bridge . . . ." See *SEPTA v. Pennsylvania Public Utility Comm'n*, Civil Action No. 95-CV-4500 (E.D. Pa. Jan. 19, 1996).

[6] The PUC cites the Second Circuit decision in *National Railroad Passenger Corporation v. City of New York*, 882 F.2d 710 (2d Cir. 1989), as a conflicting federal court decision on this issue. Pet. 10. However, as explained in Section II *infra*, the Second Circuit decision is inapposite and, in fact, specifically recognized that no conflict exists.

cember 24, 1993, Amtrak filed a Petition for Reconsideration, Amendment and Supersedeas of the December 10th order, asserting that the PUC's order was yet another attempt to impose a tax or fee on Amtrak in violation of its federal exemption.

On June 16, 1994, a PUC administrative law judge conducted a hearing regarding the assessment for the 41st Street Bridge repairs. On January 20, 1995, the administrative law judge issued a Recommended Decision, consistent with Third Circuit precedent, that Amtrak's federal exemption precluded the PUC from assessing Amtrak for repair and maintenance of the 41st Street Bridge. The administrative law judge recommended that the City of Philadelphia plan and perform the repairs to the bridge and that Conrail reimburse the City for a portion of the repair costs and assume maintenance of the substructure of the bridge. The PUC adopted the Recommended Decision by order dated March 31, 1995, and Conrail and the City of Philadelphia filed cross-appeals to the Commonwealth Court of Pennsylvania. Amtrak did not appeal or intervene in those parties' appeals because the PUC decision did not impose any obligation on Amtrak for the highway bridge and no party questioned the applicability of Amtrak's exemption.

In April 1996, the Commonwealth Court heard arguments from the appellants, the City and Conrail, and from the appellee, the PUC. Amtrak was not a party, and *none* of the parties briefed the issue of the scope of Amtrak's exemption. Rather, each questioned the allocation of costs among the appellants and made arguments regarding the effect of a 1927 contract between the City and an alleged predecessor-in-interest of Conrail and Amtrak on the allocation of costs with respect to the 41st Street Bridge.[7]

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[7] Concurrently with this petition, petitioner, respondents, and Amtrak are parties in federal court actions brought pursuant to the Regional Rail Reorganization Act of 1973 (Rail Act), 45 U.S.C. § 701, *et seq.* The issues in these cases are (1) whether Amtrak

Notwithstanding the clear Third Circuit precedent on the issue, the Commonwealth Court, *sua sponte*, revisited the scope of Amtrak's § 24301(*l*) exemption and, "[i]n an effort to convince the Third Circuit that [its characterization was] the better view," the Commonwealth Court held that an assessment for repairing and maintaining the 41st Street Bridge was not a "tax" or "fee" from which Amtrak should be exempt. Pet. App. 15a, 24a. This decision of the Commonwealth Court directly conflicts with other decisions by the Commonwealth Court which follow the Third Circuit's rulings on Amtrak's exemption. See, e.g., *Consolidated Rail Corp. v. Pennsylvania Public Utility Commission*, 671 A.2d 248 (Pa. Comwl. Ct. 1995) (PUC decision allocating costs for maintenance of bridge over Amtrak-owned right of way affirmed, although no costs were allocated to Amtrak) (Burd Street Bridge).[8] See also *Bell Atlantic v. Pennsylvania Public Utility Commission*, 672 A.2d 352 (Pa. Comwl. Ct. 1995).

The Commonwealth Court vacated the PUC's decision and remanded the case with instructions "to apportion costs . . . between the present parties and [Amtrak]."

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and/or Conrail are obligated to pay for maintenance of the 41st Street Bridge under an agreement between the bankrupt Pennsylvania Railroad and the City of Philadelphia, *City of Philadelphia v. Consolidated Rail Corp., et al.*, No. 96-01 (D.D.C. 1996) (originally filed in S. Ct. R.R.R.A.), and (2) whether the Rail Act limits highway bridge maintenance responsibilities that can be imposed upon Amtrak and/or Conrail. *Consolidated Rail Corp. v. Pennsylvania Public Utility Comm'n*, No. 96-03 (D.D.C. 1996) (originally filed in S. Ct. R.R.R.A.).

[8] As the *Burd Street Bridge* case illustrates, the Commonwealth Court has not been consistent on this issue. In *Burd Street Bridge*, the Commonwealth Court considered the proper method of allocating costs for a highway which passes over tracks owned by Amtrak but used by both Amtrak and Conrail. In upholding the PUC's allocation to Conrail, the Commonwealth Court noted that "the PUC and this Court have duly recognized the federal preemption of the subject matter of state and local assessment of charges against Amtrak for repair or replacement of railroad crossings."

Pet. App. 25a. On October 29, 1996, the PUC's Petition for Allowance of Appeal to the Pennsylvania Supreme Court was denied [9] and the PUC filed a petition for writ of certiorari with this Court, naming the City of Philadelphia and Conrail as respondents.

REASONS FOR DENYING THE PETITION

I. THE CURRENT POSTURE OF THIS CASE DOES NOT PRESENT A "CASE OR CONTROVERSY" THAT IS RIPE FOR REVIEW BY THIS COURT.

A. There Is No Genuine Adversity Between Parties Presently Before This Court.

Article III of the Constitution limits the judicial power of the federal courts to "cases or controversies." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990). "The basic inquiry is whether the 'conflicting contentions of the parties . . . present a real, substantial controversy between parties having *adverse legal interests*, a dispute definite and concrete, not hypothetical or abstract.'" *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979), quoting *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 93 (1945) (emphasis added). Indeed, one of the fundamental rules arising out of the case-or-controversy requirement is the existence of a conflict of interest between at least two genuinely adverse parties. *Poe v. Ullman*, 367 U.S. 497, 505 (1961). See *Flast v. Cohen*, 392 U.S. 83, 95 (1968) (Article III "limit[s] the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process.").

It is clear from an examination of the PUC's petition that the PUC and the respondents lack the necessary adversity to invoke the jurisdiction of this Court. The PUC's position is completely aligned with the position of

[9] In the decade of litigation on this issue between Pennsylvania and federally exempt transportation entities, the Supreme Court of Pennsylvania has never issued a decision addressing this issue.

the respondents, and indeed, with the very decision from which it appeals. In its petition, the PUC essentially urges this Court to affirm a Pennsylvania Commonwealth Court order remanding the 41st Street Bridge matter to the PUC with instructions to assign highway bridge maintenance costs to Amtrak, in spite of Amtrak's exemption from state and local taxes and fees. Pet. 11, 13. If the PUC were to prevail on the issue it presents to this Court, respondents will benefit by having an additional party—Amtrak—share the costs of maintaining Pennsylvania highway bridges. Thus, all the parties before this Court are prevailing parties for purposes of determining whether a true case or controversy exists.

As this Court held in *GTE Sylvania, Inc. v. Consumers Union of the United States, Inc.*, the presence of adverse parties "sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions." 445 U.S. 375, 382-83 (1980), quoting *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974) and *Baker v. Carr*, 369 U.S. 186, 204 (1962). See also *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937). Thus, this Court has refused to entertain cases "which disclosed a want of a truly adversary contest, of a collision of actively asserted and differing claims." *Poe*, 367 U.S. at 505. For example, in *Moore v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 47, 48 (1971), where both litigants requested the court to hold that North Carolina's anti-busing statute was constitutional, the Supreme Court dismissed the appeal for lack of a case or controversy within the meaning of Article III.

Similarly, in *United States v. Johnson*, 319 U.S. 302, 305 (1943), a tenant, at his landlord's request, brought a "friendly suit" against the landlord under a federal rent control statute. The landlord challenged the constitutionality of the statute and the United States intervened. On appeal, notwithstanding the intervention of the United States, the Supreme Court ordered the case dismissed,

holding that "[s]uch a suit is collusive because it is not in any real sense adversary. It does not assume the 'honest and actual antagonistic assertion of rights' to be adjudicated—a safeguard essential to the integrity of the judicial process . . . ." *Id.* (citations omitted). See also *South Spring Hill Gold Mining Co. v. Amador Medean Gold Mining Co.*, 145 U.S. 300 (1892) (no real controversy where control of both parties had come into the hands of the same persons).

The PUC's petition does not meet the criteria of an Article III case or controversy. Rather, the PUC comes before this Court seeking an advisory opinion whether the Commonwealth Court was justified in rejecting the long-standing federal court precedent and other decisions by the Pennsylvania Commonwealth Court governing the scope of Amtrak's federal exemption. Article III does not permit this Court "to give advisory opinions about issues as to which there are not adverse parties before us." *Princeton University v. Schmid*, 455 U.S. 100, 102 (1982). As the PUC and the respondents both seek "precisely the same result," *i.e.*, additional parties upon which to assess highway bridge maintenance, see *Moore v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. at 48, there is no case or controversy within the meaning of Article III. This Court therefore lacks jurisdiction to grant the petition.

B. This Issue Should Be Fully Adjudicated In Federal Court Before This Court Decides Whether To Exercise Its Certiorari Jurisdiction.

Congress specifically provided that the federal district courts would be the forum in which to enforce the exemption under 49 U.S.C. § 24301(*l*)(1). See 49 U.S.C. § 24301(*l*)(2) ("The district courts of the United States have original jurisdiction over a civil action Amtrak brings to enforce this subsection and may grant equitable or declaratory relief requested by Amtrak."). Moreover, under Article III it would be inappropriate for the Court

prematurely to take jurisdiction over this case. See generally *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967).

As this Court stated in *Abbott Laboratories* regarding Article III ripeness, "[t]he problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* Under this analysis, the issues presented by the PUC in its petition are clearly not fit for review by this Court at this time. Federal court adjudication is proper in the federal district court under Section 24301(*l*)(2).

The forum for resolution of the issue presented by the remand order of the Pennsylvania Commonwealth Court is available. On February 26, 1997, Amtrak initiated proceedings in the United States District Court for the Eastern District of Pennsylvania, as expressly anticipated by 49 U.S.C. § 24301(*l*)(2). Amtrak's action provides a federal court forum, short of this Court, for consideration and enforcement of Amtrak's exemption from state and local taxes and fees. The federal district court, and perhaps the Third Circuit, will have an opportunity to review all of the factual and procedural events that have occurred since its ruling six years ago.

The PUC will not suffer any hardship by following the procedure for enforcement of Amtrak's tax exemption set forth in Section 24301(*l*)(2). Indeed, the PUC itself should have initiated an action for declaratory relief in the federal district court regarding the scope of Amtrak's exemption from state and local taxes and fees. See *United States v. Allegheny County*, 322 U.S. 174 (1943), overruled sub silentio on other grounds, *United States v. City of Detroit*, 355 U.S. 466, 469 (1957) (scope of intergovernmental tax immunity is governed by federal law, because "where a federal right is concerned we are not bound by the characterization given to a state tax by state courts or legislatures."). Clearly, even the Com-

monwealth Court envisioned that the lower federal courts, and not this Court, would review its decision in the first instance. The Commonwealth Court stated that its opinion was "an effort to convince the Third Circuit that [its characterization was] the better view." Pet. App. 15a.

Moreover, the federal district court is empowered to enforce its order regarding the scope of Section 24301(*l*) against the PUC and officials of the Commonwealth of Pennsylvania. *National Railroad Passenger Corp. v. Florida,* 929 F.2d 1532, 1537-38 (11th Cir. 1991). In *State of Florida,* the Eleventh Circuit considered the authority of the federal district court to issue an injunction to enforce Amtrak's exemption from state and local laws where a state court criminal proceeding was pending against Amtrak for violation of state littering laws. In 49 U.S.C. § 24301(m), Congress exempted Amtrak from state and local waste disposal laws, and just as in the exemption at issue here, Congress granted original jurisdiction to the federal district courts over any civil action brought by Amtrack to enforce the exemption.[10] *Id.* at 1537. The Eleventh Circuit remanded the case to the district court and indicated that Congress' conferral of original jurisdiction on the district court to enforce the exemption authorized the district court to issue an injunction to state officials that ended the state criminal proceeding. *Id.* at 1538. On remand, the district court ordered the State's Attorney to "secure the dismissal of the pending cases against Amtrak" and permanently enjoined the enforcement of any laws that applied to Amtrak's waste disposal practices. See *National Railroad Passenger Corp. v. Flor-*

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[10] *Compare* 49 U.S.C. § 24301(m) ("The district courts of the United States have original jurisdiction over a civil action Amtrak brings to enforce this subsection and may grant equitable or declaratory relief requested by Amtrak"), *with* 49 U.S.C. § 24301 (*l*)(2) ("The district courts of the United States have original jurisdiction over a civil action Amtrak brings to enforce this paragraph and may grant equitable or declaratory relief requested by Amtrak.").

ida, Case No. 89-784-CIV-J-12 (M.D. Fla. July 25, 1991), reproduced here as Amicus Appendix B.

Amtrak's new federal district court proceeding will provide the opportunity for development of a full factual record that will correct errors of fact in the current decision.[11] It also will provide the requisite adversity of parties in which context a full briefing of legal issues will occur. In particular, the federal court will have the opportunity to consider the views of the Commonwealth Court on this issue. Indeed, the Commonwealth never contemplated a conflict between federal and state courts because it believed the lower federal courts would review its decision in the first instance.

Thus, the claimed hardship to the PUC created by the "direct and irreconcilable conflict" between federal court precedent and the remand decision of the Commonwealth Court is properly addressed in Amtrak's district court action under Section 24301(*l*). That court can consider all of the concerns of all of the parties and, as appropriate, order whatever relief is necessary. Only after the district court and perhaps the Third Circuit have reviewed this isuse, should this Court consider whether there is an issue that should be addressed on the merits. Accordingly, this Court should deny the petition and permit the lower federal courts to resolve any remaining issues.

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[11] The Commonwealth Court misstated the scope of the Second Circuit's opinion when it asserted that "Amtrak is required to contribute to the maintenance or reconstruction of crossings, including bridges in New York." Pet. App. at 11a-12a. The Second Circuit addressed only Amtrak's obligation to pay the franchise fee for its occupancy of tunnels under Manhattan, it did not consider any potential liability of Amtrak for the maintenance of bridges. See *infra,* 18-20. Indeed, Amtrak is not required to maintain highway bridges in New York and does not do so. The fact that the Commonwealth Court misstated this fact is perhaps a result of the total absence of briefing on this issue to the Commonwealth Court and is further evidence that this petition is not ripe for review by this Court.

II. THERE IS NO CONFLICT AMONG FEDERAL COURTS AS TO WHETHER AMTRAK IS EXEMPT FROM STATE AND LOCAL ASSESSMENTS TO MAINTAIN HIGHWAY BRIDGES.

The PUC contends that a split between the Third and Second Circuits justifies this Courts review of the scope of the exemption in 49 U.S.C. § 24301. This contention is erroneous and does not constitute grounds for the exercise of this Court's certiorari jurisdiction.

Both the PUC and the Commonwealth Court argue that there is a conflict between the decision of the Third Circuit in *Amtrak I* and the decision of the Second Circuit in *National Railroad Passenger Corp. v. City of New York*, 882 F.2d 710 (2d Cir. 1989). Pet. at 3, Pet. App. at 10a-12a. However, the Second Circuit itself recognized that no such conflict exists, 882 F.2d at 716 n.2,[12] as did the district courts in both *SEPTA v. Pennsylvania Public Utility Comm'n*, 802 F. Supp. 1273, 1280 (E.D. Pa. 1992),[13] and *Amtrak II*, 1991 WL 988, *4 n.4.[14] Amicus App. 4a.

In the *City of New York* case, the Second Circuit addressed the question of whether franchise fee payments by Amtrak to the City of New York in exchange for Amtrak's occupancy of vaults or tunnels under City property constituted a "tax or fee" under Amtrak's federal

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[12] The Second Circuit noted that "[T]he circumstances presented to us so clearly concern an area not within the parameters of section [24301] that it is unnecessary to consider the tax immunity rules considered by the Third Circuit." 882 F.2d at 716 n.2.

[13] "The involuntary assessments involved in *Amtrak I* and the instant case are clearly distinguishable from *National R.R. Passenger Corp. v. City of New York*, 882 F.2d 710 (2d Cir. 1989), on which the Commonwealth Court relied." 802 F. Supp. 1273 at 1280 n.12.

[14] "Rental payments in exchange for a benefit received [as in the *City of New York* case] are clearly not what is at issue here." *Amtrak II*, 1991 WL 998, *4 n.4.

exemption. The Court determined that these payments were not taxes or fees imposed by a local government from which Amtrak is exempt. Rather the franchise fees were the equivalent of "rent" for the occupancy of City property pursuant to franchise agreements executed in the first decade of the 20th century. 882 F.2d at 715-16 (Pet. App. at 54a-56a).

The Second Circuit based its decision on the fact that Amtrak did not own the property it was using and that the amount of the payment was determined similarly to other rental agreements and was subject to renegotiation every 25 years. *Id.* at 716. Moreover, the Court noted that Amtrak's exemption from payments is only as broad as that of the United States, and a long line of cases has established that the United States must pay rent to state and local governments when it uses their property.[15] Finally, the court found support for its conclusion that the payments were rent rather than a tax or fee in the fact that Amtrak's occupancy rights were based upon franchise agreements that had been entered into between the City and the bankrupt railroad whose occupancy rights were transferred to Amtrak. *Id.* The court found that this consensual element distinguished the franchise payments from a tax or fee, which is unilaterally imposed by a governing body. *Id.*

In contrast, the highway bridge maintenance assessments addressed by the Third Circuit in *Amtrak I*, and

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[15] In discussing the Second Circuit's opinion, the PUC claims that the assessments for bridge repairs "fits squarely into the category for which Amtrak should still be responsible." Pet. 11. Contrary to PUC's assertions, the legislative history for Amtrak's exemption makes clear that the only type of fee from which Amtrak would not be exempt is "the payment of fees for services used, such as water and sewer, just as the United States is not exempt from the payment of such fees." H.R. Rep. No. 81, 97th Cong., 1st Sess. 19 (1981), cited in *City of New York*, 882 F.2d at 714. Assessments for public highway bridge maintenance clearly do not fit within the category of water or sewer fees for which Amtrak or the United States is responsible.

at issue in this case, are not a rental paid by Amtrak for the use of another's property, but are impositions by the Commonwealth of Pennsylvania for the maintenance of public highways. Imposition of the highway bridge maintenance is neither consensual nor subject to periodic negotiation. It is unilaterally imposed by the State. Thus, the decision of the Second Circuit in *City of New York* is not in conflict with that of the Third Circuit's decision in *Amtrak I* and provides no support for either the granting of the writ or the decision of the Commonwealth Court.

III. THE *WHEELING & LAKE ERIE RAILWAY CO.* CASE IS IRRELEVANT TO THIS ISSUE.

The PUC also contends that the resolution of this issue "has ramifications beyond the Amtrak exemption statute" and points to a case now pending before the Third Circuit. Pet. 12. See *Wheeling & Lake Erie Railway Co. v. Pennsylvania Public Utility Comm'n*, Civil Action No. 94-1776 (W.D. Pa. 1996) (Pet. App. F, H, I, 58a-75a). The PUC's reliance on the interpretation of 49 U.S.C. § 11503 in *Wheeling & Lake Erie Railway Co.* is misplaced. The decisions of the Third Circuit in *Amtrak I* and in *SEPTA*, 27 F.3d at 558, as well as the decisions of the district courts, rely on the legislative history of 49 U.S.C. § 24301 and Congress' particular concern for the substantial federal investment in Amtrak. The statutory provision at issue in the *Wheeling & Lake Erie* addresses a totally different concern—*i.e.*, the prevention of discriminatory taxing against railroads generally in comparison to other commercial and industrial taxpayers by state and local governments.

The resolution of the *Wheeling & Lake Erie* case turns on issues wholly unrelated to the issues presented by this petition—foremost of which is whether a tax on railroads is discriminatory. As the Magistrate held in that case, "the state is not, in fact, prevented from imposing a tax

. . . like those involved in this case. The only limitation imposed by Congress is that a state may not impose a tax only on railroads, or in a fashion which discriminates against railroads." Pet. App. 70a. This case, by contrast, has nothing to do with discriminatory taxation. It involves solely the question of the scope and interpretation of a specific federal exemption from any state and local taxes and fees.[16]

Thus, the interpretation of Amtrak's federal tax exemption under 49 U.S.C. § 24301(*l*)(1) is only tangentially related to the issues raised in *Wheeling & Lake Erie* and that case provides no basis for granting the petition.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[16] Raising the issues presented by the *Wheeling & Lake Erie* case to this Court at this time represents an attempt to leapfrog the Third Circuit's jurisdiction to review the holdings of that case.